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being issued it became necessary to execute it according to the provisions of section 399 of that Code. The provisions of the Code of Civil Procedure, so far as they apply, appear to have been complied with. The affirmation (required by the commission to be made) has been administered, and the evidence has been duly recorded. Under the circumstances the commission seems to have been correctly executed within the provisions of the Civil Procedure Code, and we cannot see that section 13 of the Oaths Act, which has been mentioned before us, has any application. Under these circumstances we hold that the evidence taken on commission may be read.

Attorney for the plaintiff : *N. C. Bose.*

Attorney for Kumudini Dassi : *Kali Nath Mitter and Sarbadhkari.*

Attorneys for Nayan Manjari Dassi : *S. D. Dutt and Gupta.*

30 C. 937 (=7 C. W. N. 799.)

[937] ORIGINAL CIVIL.

MOHARI BIBI *v.* SHYAMA BIBI.*

[8th May, 1903.]

Creditor, right of suit by—Debt incurred by Receiver—Estate, liability of—Receiver, personal liability of—Executor or Trustee, nature of liability of—Banian lien of—Damages.

A creditor is entitled to proceed against the representative of an estate for recovery of debt incurred by the Receiver during the management of the estate by him: the right to maintain such suit against the representative is founded on the just and equitable principle that as the acts of a Receiver, acting within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. *Burt, Boulton & Hayward v. Bull* (1) referred to and explained.

A Receiver occupies a position towards an estate in his hands different from that of an executor or trustee: the latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors.

On termination of a banianship agreement, a banian's lien is indivisible and extends over every portion of the goods come into his possession as security for advances made by him, and he has a right to insist upon retaining the entire quantity of goods in his possession until the full amount of his claim is paid, and he is not liable for damages for refusing to deliver certain portions only of those goods on payment of their full value.

ORIGINAL SUIT.

One Pokhram, who carried on a business of merchant and commission agent under the name of Sewaram Buldeo Dass, died on the 6th of April 1901, leaving a large estate, which included the said business as one of the assets. On the 26th of April his cousin, Behary Lall, applied to this Court for grant to him of Letters of Administration to the estate of the deceased. A *caveat* was entered by Shyama Bibi, the present defendant. By consent of both parties, Mr. K. Chaudhuri, Barrister-at-Law, was appointed Receiver of the estate of the said deceased with [938] power, *inter alia*, to carry on the business of the said firm of Sewaram Buldeo Dass for the purpose of winding up the business. By an order made on the 5th of July 1901, leave was given to the Receiver to employ a banian for the purposes of carrying on the business

* Original Civil Suit No. 882 of 1902.

(1) [1895] 1. Q. B. 276.

with a view of winding it up. The plaintiff's firm was appointed as banian, and business was done between the firm and the receiver as manager of Sewaram Buldeo Dass. In the course of those dealings large advances were made by the plaintiff's firm to the Receiver for the benefit of the estate, and a large quantity of goods came into the possession of the plaintiff's firm as security for those advances.

Some time in the month of August 1901 the application of Behary Lall for Letters of Administration had been refused, and shortly thereafter the present defendant applied to be appointed as administratrix to the estate of Pokhiram, the said deceased. On the 23rd of May 1902 Letters of Administration were granted to the present defendant, who thereupon applied for and obtained the discharge of the Receiver. The order discharging the Receiver was made on the 22nd of July 1902.

It was alleged that the banianship accounts had been made up on behalf of the plaintiff's firm and compared with the Receiver's accounts, and that the two tallied except as regards very small sum of about 100 rupees. The Receiver having been discharged and the plaintiff's firm not being able to receive payment of the sum due to them instituted this suit against the defendant as representing the estate of the said deceased for recovering the amount, asking that the goods in their possession might be ordered to be sold and proceeds applied towards the debt due to them; and that if the sale-proceeds be not sufficient, the amount of the deficiency might be ordered to be paid out of the estate of the said deceased in the hands of the defendant.

In the written statement it was not suggested that the dealings in respect of which this action was brought were in any way unauthorized by the powers vested in the Receiver, or that the estate had not received the full benefit of all the moneys advanced by the plaintiff's firm. It was stated that subsequent to the discharge of the Receiver the conduct of the plaintiff's [939] firm had resulted in causing damage to the defendant, because in the year 1902, whilst the goods over which the plaintiff's firm claimed a lien were in their possession, the defendant made demands from time to time for delivery of certain portions of those goods on payment of their full value, but the plaintiff's firm wrongfully refused to make over the goods, and the defendant suffered loss in consequence of such refusal to deliver.

At the hearing, a contention in the nature of a demurrer was raised by the defendant, urging that the plaintiff's proper remedy was against the Receiver alone, and that the estate could not be proceeded against for recovering the debt incurred in course of dealings had with the Receiver.

Mr. Jackson (Mr. Chakravarti and Mr. B. C. Mitter with him) for the defendant. The plaintiff's remedy is against the Receiver, who is personally liable on contracts entered into by him for the purpose of carrying on the business. He cannot proceed against the defendant as representing the estate: *Burt, Boulton & Hayward v. Bull* (1), *Sargant v. Read*, (2) *Taylor v. Neate* (3).

Mr. Dunne (Mr. A. Chaudhuri and Mr. Sinha with him) for the plaintiffs. The Receiver no doubt incurs personal responsibility, but the cases cited nowhere lay down that a creditor has no remedy against the estate. The observations of Rigby, L. J. in *Burt, Boulton & Hayward*

(1) (1895) 1 Q. B. 276.
(2) (1876) 1 Ch. D. 600.

(3) (1888) 39 Ch. D. 588.

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v. *Bull* (1) go to shew that a creditor's right to proceed against the Receiver personally is recognized as a remedy additional to that which a creditor has in respect of the assets of the estate: *Douse v. Gorton* (2), *Brooke v. Brooke* (3), *Raybould v. Turner* (4).

Mr. *Chakravarti* in reply cited the following cases: *Shearman v. Robinson* (5), *Strickland v. Symons* (6), *Gosling v. Gaskal* (7), *Fraser v. Murdoch* (8), and *In re Shard* (9).

[940] SALE, J. This is a suit by a creditor to recover a very large sum of money from the defendant advanced to the estate of Phokiram deceased, in course of the dealings had between the plaintiff's firm and the Receiver of that estate appointed by this Court.

The facts under which the claim arises are as follows:—One Phokiram died on the 6th April 1901, leaving a large estate, which included as one of the assets of the estate a business of merchant and commission agent which was carried on by him under the name of Sewaram Buldeo Dass. On the 26th April 1901, one Behary Lall, a cousin of the deceased, applied to this Court in its Testamentary and Intestate Jurisdiction for grant of Letters of Administration to the estate of the deceased. A *caveat* was entered by the present defendant, and on that day, that is, the 26th April, 1901, by consent of both parties. Mr. K. Chaudhuri, a Barrister and Advocate of this Court, was appointed Receiver of the estate and effects of the said deceased with power, *inter alia*, to carry on the business of the said firm of Sewaram Buldeo Dass for the purpose of winding up the business. Subsequently the Receiver found it essential, for the purposes of carrying on the business, with the view of winding it up, that he should have the service of banians, inasmuch as no funds were available for the purposes of obtaining delivery of goods belonging to the estate in the hands of banks and other creditors. Negotiations were entered into with the plaintiff's firm, Tejpal Brahmodutt, and the assent of the plaintiff's firm was obtained to act as banians of the business of Sewaram Buldeo Dass on certain terms and on obtaining the assent of the plaintiffs, an application was made to this Court on the 5th July 1901, for leave to the Receiver to employ the plaintiff's firm as banian upon certain terms, and by an order made on the same date leave was given to the Receiver to employ a banian upon the terms proposed for the purposes of the business which the Receiver was authorized to carry on. No formal agreement was drawn up between the plaintiff's firm and the Receiver as regards the terms on which the plaintiffs were to act as banians, but a draft was made of the proposed terms which were assented to by the attorney acting on behalf of the present defendant. Business was done between the plaintiffs and the Receiver as [941] manager of the business of Sewaram Buldeo Dass. In the course of those dealings large advances were obtained by the Receiver for the benefit of the estate in his hands, and a considerable number of bales of piece-goods came into the possession of the plaintiffs as security for advances made by the plaintiffs to the Receiver for the purposes of the business.

(1) (1895) 1 Q. B. 276.
(2) (1891) A. C. 190.
(3) (1894) 2 Ch. 600.
(4) (1900) 1 Ch. 199.
(5) (1880) 15 Ch. D. 548.

(6) (1884) 26 Ch. D. 245.
(7) (1897) 66 L. J. Q. B. 848.
(8) (1881) 6 App. Cas. 855, 874.
(9) (1901) 1 L. R. 28 Cal. 574.

On the 23rd May 1902, Letters of Administration to the estate of Pokhiram were issued to the defendant. It appears that in the previous month of August the application of Behary Lall had been refused, and thereupon, or shortly thereafter, the present defendant applied to be appointed an administratrix to the estate of Pokhiram, but the order granting her Letters of Administration to the estate of Pokhiram does not appear to have been made until the 23rd May 1902, and shortly after she was appointed administratrix to the estate of Pokhiram, she applied for and obtained the discharge of the Receiver. The order discharging the Receiver was made on the 22nd July 1902.

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The plaintiffs allege in the plaint that the banianship accounts which had been made up on behalf of the plaintiffs had been compared with the Receiver's accounts and the two tallied, except as regards a small sum—a little more than 100 rupees,—and the plaintiffs not being able to obtain payment of the sum due to them from the estate of the deceased and the Receiver having been discharged, now sue to recover the amount from the estate of the deceased, asking that the goods in their possession may be sold and the proceeds applied towards the debt due to the plaintiffs, and that they may recover the balance from the estate of Pokhiram in the hands of the defendants. That shortly is the nature of the present suit. The defendant has filed a written statement which does not impugn in any way the acts or conduct of the Receiver or suggest that the dealing in respect of which the present suit has been filed are in any sense unauthorized by the powers vested in the Receiver, but the defendant in the written statement confines her defence to certain matters touching the account which the plaintiffs seek to have taken. At the hearing, however, a contention was raised which was really in the nature of a demurrer disputing the right of the plaintiffs to maintain the suit. It is alleged that the right of the plaintiffs in respect of the dealings which are [942] the subject-matter of the suit is a right which can only be enforced against the Receiver, and the suit against the defendant as representing the estate of Pokhiram is misconceived. It is not easy to apprehend in what way this contention can be supported so far as the claim of the plaintiffs is concerned as regards the goods in the possession of the plaintiffs' firm and in respect of which they claim to enforce their lien. They seek to have these goods sold, and seeking in this way to deal with the goods in question, it is not easy to see how or in what way the plaintiffs could proceed to enforce their lien except in a suit to which the representative of the estate is a party. No doubt the claim is more than this. The plaintiffs ask to recover the balance of their claim after obtaining satisfaction *pro tanto* from the sale-proceeds of the goods in their hands out of the general estate in the hands of the defendant.

It has been strongly urged that the plaintiffs are not entitled to proceed against the estate to recover the debt incurred in course of dealings with the Receiver appointed by this Court, and it is said that the plaintiffs' proper remedy, if any, is against the Receiver alone. Now I am not aware of any case in which the question which is now raised has been dealt with, nor do I think the cases which have been cited in the course of the arguments support the contention put forward on the part of the defendant. No doubt the cases cited show that where the Receiver has been authorized to carry on a business that it is a necessary result of his appointment that he should render himself personally res-

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possible for debts incurred in course of his dealings, but nowhere is it suggested that this is the only remedy which a creditor has in realizing his debt, and indeed, I think there is very much in the case of *Burt, Boulton & Hayward v. Bull* (1), which is a case strongly relied on by the defendant, which goes to show that this remedy against the personal responsibility of the Receiver is really recognized as a remedy additional to that which the creditor has in respect of the assets of the estate with which he has been dealing through the Receiver. I need only refer to the observations made by Rigby, L. J., in the course of his judgment. After dealing with the undoubted personal [943] responsibility incurred by the Receiver in respect of his dealings with the creditors of the estate, Rigby, L. J., says:—"The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment." I think it is not too much to say that none of the learned Judges who decided the cases which have been cited ever supposed that the opinion they expressed as regards the personal responsibility of the Receiver had the effect or could be so regarded of cutting down or restricting in any way the creditor's right of recovering his debt directly from the estate so long as there remained any assets of that estate available for that purpose.

Now, as shortly as possible, I will state what I think is the principle underlying the right of a creditor to recover his debt from an estate with which he has had dealings through a Receiver. It appears to me that a creditor's dealings with executors or trustees carrying on a business for the benefit of an estate in their hands, but which estate is not under the direct control or management of the Court, are not quite in the same position in relation to that estate as the dealings of creditors with a Receiver acting under direct orders of the Court. In the latter case creditors deal with the Court through its Receiver, and the Court imposes obligations on the estate through the Receiver for protection of creditors dealing with the Receiver. It doubtless is the law, as appears from the case already cited, that in carrying on a business under directions of the Court a Receiver must necessarily incur personal obligations, but in incurring these personal obligations it seems to me that he necessarily and under the authority of the Court imposes obligations on the estate for the benefit of those creditors with whom he has dealt, and which obligations the Court ought and does give effect to and it is in this respect that a Receiver occupies a position towards an estate in his hands different from that of an executor or trustee. The latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors and it appears to me that the power of a Receiver to bind an estate in his [944] hands in favour of creditors dealing with him so long as he acts within his authority, is as necessary a consequence of the Court's managing or carrying on a business through a Receiver as the personal responsibility of the Receiver in acting under that authority. Numerous instances may be cited where the Court enforces obligations created by a Receiver in favour of creditors as against the estate in respect of which those obligations have been incurred. For example, leases and mortgages executed by a Receiver have frequently been enforced by

(1) (1895) 1 Q. B. 276.

this Court as against parties beneficially interested in the estate. Debts also, due to creditors for goods supplied to a Receiver have been ordered to be paid summarily on motion where there is a fund in Court belonging to the estate, and instances of this class may be cited as shewing that the attitude of the Court towards creditors who have dealt *bona fide* with a Receiver of an estate is rather to assist such creditors to recover their amounts due from the estate than to throw obstacles in their way.

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In the event of a Receiver being sued for acts done by him as such he would doubtless be entitled to rely on his right to indemnity as against the estate; and in order to try this question of indemnity it would be necessary to secure the presence of the beneficiaries or others as parties to the suit who are interested in questioning the authority of the Receiver. But I do not think that it is necessary to resort to the doctrine of the creditors' right to the benefit of the Receiver's indemnity as a foundation for the right to sue the estate for a debt incurred by the Receiver. A right to maintain such a suit is, in my opinion, founded on the just and equitable principle that as the acts of a Receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. If this be the principle which is applicable to the facts of the present case there can be no question that the plaintiffs are entirely justified in the course they have adopted in seeking to recover their claim against the estate in the hands of the present defendant.

I arrive at this conclusion dealing with the argument as of the nature of a demurrer and assuming that the facts in the plaint [945] are true; the written statement of the defendant admits all the material facts to which I have referred, and the defence is based not upon an allegation that the acts of the Receiver are in any sense improper or unauthorized or that the estate has not had the full benefit of all the monies advanced by the plaintiffs, but it is said that subsequent to the discharge of the Receiver the conduct of the plaintiffs has resulted in causing damage to the defendant. It is said that in the year 1902 whilst the goods over which the plaintiffs claim a lien were still in the plaintiff's possession, that the defendant made demands from time to time for delivery of certain portions of those goods on payment of their full value and that the plaintiffs wrongfully declined to make over to the defendant the goods in respect of which the full value was offered to the plaintiffs, the result being there was loss to the defendant of the prices which they would have obtained for those goods. It is contended that the plaintiffs had no right to refuse to deliver the goods in respect of which demands were made in as much as obtaining the full value of the goods the delivery could not have been prejudicial to the plaintiffs for they would have had the value of goods represented in money in place of goods themselves. This argument, it seems to me, does not affect the right of the plaintiffs to hold, if they were so advised, after cessation of the banianship, the entire amount of the goods in their hands at the time the plaintiff's firm ceased to act as banian for the defendant's business, as security for the total amount of their claim representing the advances made on the goods, interest on the advances and commission.

Whether the plaintiffs were well advised or ill advised in insisting upon what I think was their right, is not a question which affects the present suit. All that is necessary to be said is that as the plaintiff's lien was

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indivisible and extended over every portion of the goods for the entire debt, they had a right to insist upon retaining the entire quantity of the goods in their possession until the entire amount of their claim was paid. That being so, it seems the case for damages made by the defendant fails. That is in substance, the only defence to the suit raised by the written statement. It appears to me that the plaintiffs are entitled to have an account taken of what is due [946] to them on the banianship dealings in respect of the firm of Sewaram Buldeo Dass ; and in taking that account the defendant is entitled to raise the question which she has raised in the 6th paragraph of her Written Statement in respect of Rs. 19,179-9-3 alleged to be due in respect of certain chitties which the defendant says the plaintiffs ought to have realized.

An order has already been made in course of the suit giving the plaintiffs the right to sell the goods in their possession and hold the proceeds pending the determination of the suit. The present decree does not affect in any way that order which I think must remain in full force and effect.

The costs of suit reserved until the taking of the accounts.

Judgment for plaintiff.

Attorneys for the plaintiff's firm: *Manuel & Agarwalla.*

Attorney for the defendant: *S. C. Mitter.*

30 C. 937 (=7 C. W. N. 514).

[947] APPELLATE CIVIL.

BANARASI PERSHAD *v.* MAKHAN ROY.*

[19th June, 1903.]

Rent, suit for—Money admitted to be due to landlord—Burden of proof—Plea of 'confession and avoidance'—Rate of rent—Bengal Tenancy Act (VIII of 1885), s. 150.

Section 150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him ; in other words, where it is a plea of confession and avoidance. The section does not, therefore, apply to a case where the rate of rent is in dispute.

[Ref. 62 I. C. 80=1921 Pat. 301.]

SECOND APPEAL by the plaintiff, Banarasi Pershad.

The plaintiff brought two suits for rent against the defendant for the years 1303 to 1306 F. S. with cesses and damages. In one of the suits, namely No. 482 of 1899, the rent was claimed for 11 bighas 8 cottabs of *jote* land at the annual rent of Rs. 26-8-2½ dams. The defendant in his evidence admitted that rent was due for the period in suit, but that it was for 9 bighas of *jote* land at the annual rent of Rs. 9. There was a similar dispute as to the rate of rent in the other suit.

The Munsif found that the plaintiff had failed to establish his case as to the rates of rent, and decreed the suits at the rates admitted by the defendant with cesses and damages. An application dated the 13th March 1900 filed by the plaintiff for the adjournment of the hearing of

* Appeals from Appellate Decrees Nos. 1860 and 2354 of 1900 against the decree of Kali Kumar Bose, Subordinate Judge of Bhagalpore, dated Aug. 28, 1900, confirming the decree of Saroda Prosad Chatterjee, Munsif of Bhagalpore, dated March 29, 1900.